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DEPARTMENT OF LAW

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## THE COUNTRY LAWYER.

Address by

W. U HENSEL,

*Before the Sharswood Club of the Law School of the University of Pennsylvania, at its Twenty-seventh Annual Dinner, at the Bellevue-Stratford, Philadelphia, on Saturday, April 16, 1910.*

[Mr. Hensel was the guest of the Sharswood Club at its annual dinner in 1909. Owing to a misunderstanding he anticipated only a call upon him for a brief, informal response to a toast, whereas he was announced on the program to deliver "the annual address." In the course of his off-hand remarks then he referred to the fact that if he had understood the nature of his appointment he would have been glad to read to the club a paper on "The Country Lawyer", whereupon he was unanimously requested to adopt that topic and make the address at the annual dinner in 1910.]

*Mr. Toastmaster and Gentlemen:* It is seldom one is taken at his own valuation. When I jocosely proposed myself a year ago for re-election as your guest I thought I knew enough of the unwritten law of this association to suspect a second term was odious to it. The suggestion, however,

was taken seriously. You are like the persistent suitor in "Punch", who, when he stammeringly announced to the prospective father-in-law, "I wish to marry your daughter"; got the cautious reply: "Well, my boy, hadn't you better see her mother first?" The undeterred swain promptly followed it up with: "I have, sir, and—er—er—I still wish to marry your daughter."

So it happens "I'm with you once again", rather by your own favor than by any deliberate contrivance of mine. Nor have I choice of subject. That was unanimously elected at the same time; and I trust that a twelve-month has not staled its interest, even if I am not able in a brief sketch to present its "infinite variety".

To an association whose title bespeaks the deserved admiration of its members for an eminent jurist, who was peculiarly a "city lawyer"; and to a company composed largely of those whose professional experiences have run or are expected to run on lines of metropolitan practice, it may be grateful, as the time for summer recreation approaches, to ramble through the green pastures and by the still waters of a country lawyer's practice.

I am not at all insensible to the fact that with the highly developed efficiency of transportation and communication, with railroads, telephones, telegraphs, newspapers and automobiles bringing every section of the commonwealth into close touch—bridging space, annihilating time and erasing geographic lines—country really "isn't country any more." Contemplating especially the three vocations we used to call "the learned professions", the country lawyer, being located mostly at county seats or in considerable centres of population, has not even lasted with the country preacher or the country doctor; but during the two centuries that have elapsed since the proprietary owned a wilderness three hundred miles long and one hundred and fifty miles broad, and during a very considerable part of the time since law reports began to be published, there has been a highly interesting series of questions considered and determined by the courts, which the members of the profession whose experi-

ence is limited to city practice seldom encounter. Indeed, many of them are altogether passing away, as the notable race of strong men who grappled with them in the past is gradually becoming extinct. They nevertheless exercised and developed the best faculties of the legal mind; they engaged the attention and challenged the conflict of many rare intellects, and out of their study and settlement was bred a line of lawyers and judges, who—with all deference to the traditional “Philadelphia lawyer”—have, with him, largely helped to illustrate the highest attainments and to accomplish the most enduring triumphs of the Pennsylvania bar and bench.

Mr. Fiske points out that the fundamental difference between the political basis of Teutonic and Graeco-Roman civilization is that whereas in the Teutonic system civic communities never held the foremost position, the failure of the Greek and Roman political systems was largely due to their exaltation of the idea of the city. Mr. Jefferson, it will be remembered, expressed an utterly exaggerated significance of rural life and experience, and grossly over-rated the national danger from the growth of cities; but it is likely true that some of the differences between the ideas that have been cherished by opposing parties in this country was due to temperamental differences between the founder of one, who came to public position from the counting room, and the father of the other, who came from the plantation. We have long since ceased to regard the etymology of “urbanity” and “politeness”—just as the nation no longer is restricted to two ideals—“the man on horseback”, and “the man in his shirt sleeves”.

#### ORIGINAL LAND TITLES.

Likewise to an exceptional degree among the early commonwealths Pennsylvania was dominated by its metropolis, capital and chief city of the country. But with the controversy that arose in the settlement and improvement of the interior over boundary lines and the unending disputes grouped under the subject of “Original Titles,” came the

characteristic land lawyer, who mingled woodcraft with mathematics and often exhibited a range of learning, a subtlety of distinction and power of advocacy, a knowledge of men and locality, of mineral and organic life, and a profundity of legal learning that found no narrower range of exercise than prevailed in the branches of practice which more particularly demanded and engaged the attention of the city lawyer. Nowadays when titles throughout the commonwealth have been generally settled and what were once vast areas of wild land—scarcely worth their taxes, and often sold to pay them—have become the consolidated holdings of great corporate interests working or retaining them for the development of their natural resources, the occasion that called out the rural “land lawyer” has passed. He was an entirely different man from the “real estate lawyer” of Philadelphia. The cleavage that once marked the profession and cases is growing indistinct. But for nearly a hundred years and through nearly two hundred volumes of Pennsylvania reports are to be found a highly romantic series of cases and succession of questions almost limited to the interior localities and to practitioners at what might be called the “country bar.”

There is little occasion for the legal novitiate, whose client will readily allow him \$15 or \$20 for the purchase of a title insurance, to know the significance of what even to some of his elders might sound as the jargon of “living witnesses” and “bench marks,” “a block of surveys,” “a tier of warrants,” “calls, marks and monuments;” but the story of that litigation is a most important part of the history of Pennsylvania. Three generations of astute lawyers engaged in it with a zeal that reached the high water mark of professional achievement, howbeit some of them were not familiar with ground rents, party walls and mechanics’ liens. How the old surveyors made their ways over, through and around hills and swamps, by thicket and forest, with rude instruments and imperfect tools of measurement, blazing their paths on the trunks of trees, is told almost romantically in the land cases, which “reduced general and inde-

scriptive expressions to a fixed certainty." How warrant, survey and patent were related back to the application; how the inchoate right of entry drew it to legal possession; how conflicting rights were determined by priority of warrant or the date of the legal survey; how locations were shifted from one bank of the creek or one side of a hill to the other; the story of the "lottery applications," title by improvement and settlement, or based on Indian purchase; the distinction between straight level measurement and the surface measurement over hills and uneven grounds; the vacancies and the overlapping of conflicting surveys; marsh lands and fast lands; whether a bunch of logs, skillfully framed at a corner which called for an old beaver dam, was the carpentry of man or of the sagacious and skillful wild animal; the relative certainty of roads, streams and trees as monuments—are phases of a great body of law, which an applicant for admission to the bar of the Supreme Court may now disregard without fear and of which even a justice of that high jurisdiction may confess himself ignorant without reproach.

#### COAL, GAS AND OIL RIGHTS.

The beloved ex-Chief Justice, whose term has just expired, in the last of many felicitous and reminiscent speeches and papers, stated what has no doubt been the experience of many who occupied high place on the bench and many others who were or are in the first rank at the bar. In his notable "farewell address" at Pittsburgh, in December, he said: "Coming to the Supreme Court city bred and having had an apprenticeship of seventeen years in the District Court and Court of Common Pleas No. 2 of Philadelphia, two of the busiest courts in the Commonwealth, I felt fairly at home in questions incident to city life and industries. But it did not take long to find out that big as Philadelphia was, Pennsylvania was bigger yet. Western Pennsylvania, especially, in its phenomenal development was raising a crop of new questions about timber and lumber rights, mining rights and mining conduct, oil rights, gas rights, torts inci-

dent to oil and gas production, leases and options, royalties and forfeitures, and others, many as difficult as they were important. One case made a special impression on me, where the owner of land had granted the whole body of coal without reservation, and subsequently having a hope that he might find oil or gas under it was puzzled to know if the common law doctrine of ways of necessity wouldn't enable him to get at it. As was said, there had been more deep wells bored in Western Pennsylvania within a few years than in all the world in all previous history, and the new development brought new questions enough to puzzle a Philadelphia lawyer."

So it was generally that in the development of the natural resources of the State a great variety of questions arose—first, because the increase in value of timber, the requirements of railroads, the discovery of oil and the development of coal made vital the disputes over boundary lines of valuable property; and, secondly, the processes of development involved wholly new problems—to be tested and settled, however, by analogy with old principles of law and equity. The particular case to which Chief Justice Mitchell refers [*Chartiers Block Coal Co. v. Mellon*, 152 Pa., 286], has always been, to my mind, one of the most interesting in the reports and illustrative of several phases of the theme upon which I am endeavoring to fix your attention.

The fact that it was argued by Pittsburgh counsel, and not by what might be strictly classed as "country lawyers," suggests that as to what were once rural interests, the development of the soil or the unlocking of its treasures came to require vast corporate consolidations of capital and their legal direction shifted to the large cities—Pittsburgh especially centralizing much of the coal, coke, oil and natural gas litigation. The populous centres of the anthracite region, like Wilkes-Barre, Scranton, Sunbury and Pottsville, also produced a typically strong race of practitioners, who mingled many of the best characteristics and high abilities of both country and city lawyers and took notable rank at the State bar and in the courts.

The Coal Companies and Mellon's cases also illustrate how readily new discoveries of rich physical resources raise novel questions for litigation. Chief Justice Paxson opens his discussion of the case leading up to the unanimous judgment of the court with the words: "This is a case of first impression;" and, he continues, "of very grave importance." Later he said: "This is a new question and full of difficulty." The owner of the surface had parted with the coal, and the grantee had all the essential mining privileges. Neither foresaw a rich underlay of oil and gas; and when other lessees for these later and lower purposes began to drill, the coal companies sought equitable protection, even to the extent of prohibition. This was measurably refused—which is not of so much importance from our present viewpoint as some general observations which occur in the opinion of the Chief Justice: "The discovery of new sources of wealth, and the springing up of new industries which were never dreamed of half a century ago, sometimes present questions to which it is difficult to apply the law, as it has heretofore existed. It is the crowning merit of the common law, however, that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise. This may be called the expansive property of the common law."

He goes on to contrast the changed conditions from the time when a man "who owned the surface owned all that grew upon it and all that was buried beneath it," and his "title extended upward to the clouds and downward to the earth's centre" until advanced geology, mineralogy and machinery had so changed the uses and values of land that forest was succeeded by farm, fertile fields underlaid with coal, and under them all vast cauldrons of oil and retorts of gas.

Mr. Justice Williams, who was a very able land lawyer, of large experience, in a concurring opinion expressed his willingness to go even farther than the chief in denying to the owner of the coal interference with the owner of the soil from getting out his underlying oil and gas. He said,



with the concurrence of two of his colleagues: "I would lay down the broad proposition that the several layers of strata composing the earth's crust, are by virtue of their order and arrangement subject to reciprocal servitudes; and as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of the several layers or strata to and from which they are due. the courts should recognize and enforce them. When the servitude is the result of natural forces affecting the conformation of the surface the courts have taken notice of it and enforced it for and against adjoining owners. Thus, the owner of land crossed by a stream has a right, as against the owner above him, to insist on the delivery of the stream to him within its natural channel; and he is in turn bound to receive it from such upper owner. He is under a like duty to deliver it to the owner below him, and has a like right to insist that such owner shall receive it from him. The true foundation on which the relative rights and duties of these several owners must rest is not found in the order of their respective purchases, nor in the terms of the conveyances under which they take title. It is not found in any statute regulating the flow of streams or the duties of riparian owners. It is found in the character of the surface over which the stream flows, and the operation of the laws of gravity upon the water of the stream."

The judicial notice which he takes later in his opinion of the importance of the oil development in the State, is highly interesting; it suggests the importance of preserving in the appellate jurisdictions a well balanced representation of different localities and of members of the court with a wide range of practical experience, as well as the legal learning of the chamber.

In *Lillibridge v. Lackawanna Coal Company* [143 Pa., 293], it will be remembered that a three to four decision of the Supreme Court held that the space underground remains in the grantee and does not revert to the grantor until all the coal granted shall have been removed. This was an action brought by the grantor to restrain the grantee from

using a passageway through the granted coal vein to other property of the grantee, on the ground that the coal only and not the space had been granted. It was held that the space remained in the grantee as long as there was any coal remaining in the tract and while it was necessary to the grantee's use.

Whether or not coal was realty or personalty when brought up from the mine and thrown upon the earth in a mound mixed with the dirt, and in its original condition, was an important question determined in *Lehigh Coal Co. v. Wilkesbarre and Eastern Railroad Company* [187 Pa., 145]. It was decided that coal in such a state was personalty, although not entirely severed from the soil, following an earlier like ruling with regard to iron ore.

In the frequent litigation which grew out of the famous Cornwall iron ore estates, in Lebanon County, and the novel schemes of their ownership, management and control, originated numerous cases such as *Coleman v. Coleman* [19 Pa., 100]; *Coleman v. Grubb* [23 Pa., 394]; *Coleman's and Grubb's Appeals* [62 Pa., 252], and the *Robesonia Furnace* case. Many curious lawsuits engaged the mingled services of the keenest intellects of the country, as well as the city bar—such names as McMurtrie, Penrose, Biddle, Meredith and Strong being associated with Black, Hughes, Kunkel, Kline, Reynolds, Slaymaker and Weidman. Judge Woodward delivered the opinion of the court in some cases, and Judge Sharswood in others, and both drew largely on their wide range of land and mining law.

The Supreme Court early in the development of oil was asked to decide to whom belonged the natural gas and oil deposits in Western Pennsylvania, and whether the owner of land had an action against his neighbor because a drilled well drew the oil from his land. In *Westmoreland Natural Gas Co. v. DeWitt* [130 Pa., 235], oil and gas were put upon the footing of percolating streams of water; they belonged to the owner of the well to which they flowed, irrespective of where they originated.

The interpretation of oil, coal and gas leases propounded the question settled in *Dunham and Shortt v. Kirkpatrick* [101 Pa., 36], in which a reservation of "all minerals" in a grant did *not* include petroleum, notwithstanding scientists and lexicographers held contrary. The court reasoned on the ground that in a technical sense all land was composed of minerals, and, therefore, the reservation must be as comprehensive as the grant. The word "minerals" was interpreted in the light and under the circumstances of the contract, which did *not* include oil in such classification.

In *Funk v. Haldeman* [53 Pa., 229], Chief Justice Woodward had treated oil as a mineral, admitting that with an increase of scientific knowledge different classification might ensue. He said: "If a mineral, it is part of the land; and a right to take land or any part of land is not, strictly speaking, an incorporeal hereditament. Nor is the right to fire bote, or plow bote or turves; and yet, for the want of a better classification, this is treated in law as an incorporeal interest. To the same head is to be referred these oil rights."

Of water, oil and gas it was said in *Brown v. Vandegrift* [80 Pa., 147], by Agnew, who eminently had the training of the country bar: "Their fugitive and wandering existence within the limits of a particular tract is uncertain." In *Gas Co. v. DeWitt* [130 Pa., 249], Justice Mitchell, who had already become a good "country judge," introduced what he called the fanciful analogy of "minerals *feræ naturæ*." Petroleum and gas were finally fixed as minerals in *Marshall v. Mellon* [179 Pa., 371]; and in *Light & Heat Co. v. Elk County* [191 Pa., 468], surface rights and gas rights were made divisible for purposes of taxation.

#### THE LAW OF WATER RIGHTS.

In the earlier days of rural development the grist mill and its accompanying water power were subjects of great domestic concern. The more or less sluggish streams that wound themselves through the rich farm lands of Pennsyl-

vania were harnessed at every succeeding level to the water wheel; and the rights of riparian owners, or of the superior and lower mill dams, were constantly the subject of invasion and defense. The earlier reports especially attest the frequent battles of the local legal giants over these issues. As early as *Hoy v. Sterrett* [2 Watts, 327]—frequently referred to and affirmed—in which the upper owner charged the lower with backing the water upon his wheel, and the latter claimed that his proper share of the water was withheld, it was decided that no action lay for the reasonable holding of the stream by the upper owner, but that any unreasonable or malicious deprivation is actionable.

New cases arising from development and improvement involve the riparian rights of railroad companies, as in *Pennsylvania Railroad Company v. Miller* [112 Pa., 34], it was held that while a railroad could not take water from a flowing stream to such an extent as to damage the lower owner, and that as an upper riparian owner it had no right to diminish the stream, it could do so under its power of eminent domain by making just compensation.

In the case of the *Asylum for the Chronic Insane near Womelsdorf* [*Fieber v. Deibert*, 22 Sup. 362], it was held that an institution comprising a thousand employees and inmates had the same rights as a community of like population located on the banks of the stream:

“All those who lawfully occupy riparian lands have a right to the ordinary use of the water of the stream for the purpose of supplying their natural wants, including drinking, washing, cooking and about their habitations for such things as are necessary to the preservation of life and health. This natural right is not dependent upon whether the dwellers by the stream occupy homes or hospitals, are sheltered by tents, or live in the open \* \* \* , but the asylum cannot take water to operate a fountain, nor for the manufacture of ice to be sold away from the premises.”

In *Brown v. Kistler* [190 Pa., 499], an upper riparian owner was adjudged the right to use the water not only for domestic purposes for watering stock, but for manufactur-

ing purposes to a reasonable extent, even though the lower owner should be injured thereby.

Interesting legal questions peculiar to rural conditions was the locus of an injury caused by a municipal corporation taking lands in one county and working an alleged injury felt only in another jurisdiction. If the damage was the cause of the legal action must it be sued for where the injury was experienced? And if so and a municipal corporation can be sued in a State court only in the county in which it is located, the victim of a wrong seemed to be in the equivocal position of the hungry ass between two bundles of hay. In another case, where a Pennsylvania corporation, with the right of eminent domain, took water from a Pennsylvania stream, diminishing the water power of a Maryland corporation, the jurisdiction for recovery gave rise to questions of novel interest. [*Octoraro Water Co. Cases XXIII, Lancaster Law Review*, 196.]

It was held by President Judge Landis, of Lancaster County—one of the most capable and typical of the “country judges,” who adorn the Pennsylvania bench—that as “a State cannot condemn beyond its own limits,” a Pennsylvania water company taking water from a stream that would naturally flow into Maryland is not entitled to have the damages assessed by viewers.

In *Dark v. Johnston* [55 Pa., 164], it was held that—as the grant of water passes nothing for which ejectment will lie—oil is not the subject of property except in actual occupancy.

*Haldeman v. Bruckart* [45 Pa., 514); *Lybe's Appeal* [106 Pa., 626], and *Williams v. Ladew* [161 Pa., 283], are interesting cases on the subject of injuries caused to the subterranean supply of water by the lawful acts of a landowner when the stream is not well defined or easily discernible and when the injury is not caused by negligence or malice; but in *Whitley v. Baugh* [25 Pa., 528], it is intimated that if any distinct watercourse, leading to the point where the stream was tapped, could be ascertained and it should appear that it could have been preserved without

material detriment to the owner of the land through which it flowed, the destruction of it might be attributed to malice or negligence.

Had Judge Sharswood been to the miller "manner born," he could not have better understood the mutual rights and equal equities of a fulling mill and a grist mill, on opposite sides of the same creek, than he expressed them in *Lindeman v. Lindsey* [69 Pa., 93].

Admiralty practice and the laws of piers and wharves and tides and navigation—except rafting—were practically unknown to the country lawyer; but the litigation over water rights, the swell of the stream upon meadow lands, the backing of the water upon a neighbor's or a competitor's mill-wheel and other legal incidents of the use and abuse of rural water powers, had once a significance, as occasions for law-suits, that has almost passed away.

#### THE LAW OF THE FARM.

Of course the questions that arise peculiarly in regions mainly agricultural have always been characteristic of the country lawyer's practice. Notwithstanding they often involve comparatively trifling amounts of money, they have been urged with a fervor that is sometimes lacking in the colder conflict of large commercial and corporate interests. For reasons indicated at the outset and which readily suggest themselves to the student of English law, the customs that are related to the tillage of the soil, to its ownership, occupation and use, for the support of human and animal life, run far down to the tap roots of our jurisprudence. Two great races that contributed most to the making of our commonwealth in its interior have been in turn its farmers; the country lawyer who has been fortunately placed to distinguish their marked racial differences has found endless variety in the study of their several qualities as litigant and client. The typical Scotch-Irishman loves a law suit, "bully-rags" his lawyer and hates to pay fees; while the patient, plodding and thrifty Pennsylvania German is averse to litigation, but is as submissive to his attorney in the direction

of the case, as he is content with the fee charged. As claimants in the Orphans' Court they are especially large-minded and free-handed; and in the distinct Pennsylvania German sections of Eastern Pennsylvania the practice in that court has a relative importance and value that attaches to it nowhere else. Incidentally, I remark, that for a *nisi prius* judge the temperament of this race seems to be a quality of success; and while few of that numerous and deserving people have reached the appellate courts of the State, as Common Pleas judges a large number have attained most honorable distinction and have displayed that genius of common sense, which, with common honesty, goes far to the making of an uncommon common pleas judge.

Tenacious of lands since Tacitus praised them, and as jealous of its possession as when Dr. Rush rather superciliously criticized them—the protection of the soil and the preservation and increase of its fertility have always been an inspiration to litigation where the most advanced farmer folk settled and stayed. The laws of descent and distribution are, of course, common, but I suspect the fastening of the widow's statutory dower upon lands—sometimes three or four such charges attaching to one tract; the apportionment of them, as sub-divisions, are made, are much more frequent in the country districts; they often create great perplexities of title and dubious issues in final distribution.

The laying out and vacation of public roads often rack a rural community with lasting feuds and have given rise to a great body of law upon views, reviews and re-reviews which has little practical interest for the city specialists. Division and line fences have ever been a fruitful source of litigation over comparatively trifling interests; but loyalty to a farmer client, especially, exacts from the leisure of a country lawyer that he give the subject comprehensive study and diligent attention. Copious illustrations of this appear especially in the earlier reports, and some of the opinions reflect the rural training of the judges who wrote them.

In *Dysarts v. Leeds* [2 Pa., 488], a "per cur." handed down when Gibson was Chief Justice, and his associates

were Rogers, Kennedy, Sergeant and Burnside, it was held that a partition fence may be erected by either owner at pleasure, and his occupation of the requisite land of his neighbor for that purpose is not adverse, but by permission. When the owner of the adjoining tract clears, and encloses to a fence already erected on the boundary line, he may insert the rails of his new fence into the partition fence, and if they project a short distance the injury falls within the maxim *de minimis*, &c.

In *Rangler v. McCreight* [27 Pa., 95], Lowrie held that where neither party insists upon such a common partition fence they were presumed to have mutually agreed so to occupy their respective parts that it be not needed; and where one insisted upon putting up his share of the partition fence and the other refused to do so, injury by his neighbor's cattle going upon his land, was held to be the result of his own negligence and he could not recover damages.

*McCoy v. Hance* [28 Pa., 149], reaffirming Judge Huston in *Martz v. Hartley*, laid down the doctrine that although paper titles called for a straight line between acknowledged landmarks, a crooked fence which had stood for more than twenty years constituted the legal line. Judge Huston's knowledge of the laws of forestry, as well as of human nature, supplied the court with judicial notice in that case. He said: "After the lapse of many years, line trees are not found, and nobody who knows anything about it expects to find them. Trees die as well as men; are liable to wind and fire; and, like men, are sometimes maliciously destroyed; the line as used and established by consent, as designated by fences, seen and acknowledged by both parties, the admission of a fact, as that a corner stood at a particular spot, and proof that both parties have admitted it for twenty-one years, is conclusive; so much so, that positive proof, the truth of which all admit, will not move a fence between two fields, which their owners have admitted for twenty-one years to be a line between them."



The law of way-going crops is more in vogue on the Conestoga and Pequea than at Broad and Chestnut; and yet it has at all times engaged the struggle of minds as clear and vigorous as those which now wrestle with trust and transit problems.

I can conceive of a man graduating with honor from the University Law School who did not distinguish why one can shoot his neighbor's peaceful pigeons with impunity, but dare not kill his noisy guineas, squawking pea fowl or crowing game cock; and one may even pass the harrowing examination of the State Board of Law Examiners without altogether comprehending the length and breadth and height and depth of what a country lawyer understands by a fence, "horse high, bull strong and hog tight." Mr. Olyphant's "Bob, Son of Battle," is a noble tribute to a noble race; but the diligent student of Pennsylvania law will have to look to the cases from "up the State" to see what the great jurists have laid down as to the rights and wrongs of sheep-killing dogs.

Even a judge without horticultural experience might be excused for failure to take judicial notice that "yellows" was a disease of the peach tree, contagious and dangerous to the community [*State v. Main*, 69 Conn., 123]; while a man might practice law for a long time on the village green without being able to decide the important question on which the Supreme Court of the United States reversed itself over night, at the instance of several of its housewives, viz., whether a preparation of anchovies was a "sauce" or "prepared fish." [*Boyle v. Magone*, 152 U. S., 623.]

Ignorance of the law that grass is neither an emblement nor a way-going crop would not utterly disqualify a patent attorney; it might not materially prejudice a young lawyer whose ambition was limited to the bankruptcy court to forget that in *Reiff v. Reiff* [64 Pa., 135], the Court said: "It may be admitted that Indian corn, wheat, rye, oats, buckwheat and potatoes and even hemp, Hungarian grass, flax and millet are included among the emblements that do not pass to the remainderman, but all of these are annual pro-

ducts; when cut the root dies. It is not so with clover, timothy and meadow grass."

But no lawyer from town, country or suburb is less a lawyer because he understands the judicial processes by which corn, hay and oats are pronounced personal property, while organic fertilizer of domestic production is made to smell sweeter by the judicial nomenclature which pronounces it *real* real estate. This, of course, in a country barnyard. Like some of the rest of us, it makes much more dignified presentation when it comes to town, and, therefore, the sweepings of a city livery stable have been held to be personalty [*Daniels v. Pond*, 38 Mass., 367; 21 Pickering, 367.]

The severance of crops and the transition of realty into personalty by such severance often presents unique problems to the country lawyer. If wheat is a way-going crop, what is grass sown with the wheat, to be cut next year? Is manure a way-going crop, or is it part of the freehold? In one case [32 Atl., 208], where there seemed to be an intention to reserve it for the whole farm, it was held not to pass with a small section on which it was piled. In another [*Lewis v. Jones*, 17 Pa., 262], where a tenant leased a small farm of twenty acres and *bought* grain for his cows, the court refused to charge that, even though the tenant left as much manure on the farm as could be produced from the produce of the farm itself when fed, he was entitled to the rest.

#### TYPICAL COUNTRY LAWYERS.

Were there no limitations upon my time, nor even upon your patience, I might enlarge upon these illustrations of phases of practice which aforesaid at least were peculiarly within the range of the country lawyer. The law of paupers supported by outdoor relief, their settlement and removal in many counties of the State, have furnished noteworthy cases; with their discussion are associated some of the brightest minds of the profession, and to their determination eminent judges have brought high learning and rare practical wisdom.

Did the privileges of this occasion or the scope of this paper permit it, personal contrasts would more vividly illustrate the distinctions between the experience of the country lawyer and his more fortunate city brother. In the earlier days of the Supreme Court—a place which is the very fit goal of a Pennsylvania lawyer's highest ambition—its members were necessarily more largely drawn from the city bar; but later they have been rather evenly distributed. The same is true of the office of Attorney General. It is for others to say whether either class—so far as they can be classified—suffers by comparison. Of those whose faces look down upon my own daily work, from Mr. Campbell's gallery of engravings, I regard Gibson and Black, and of the associate justices within my own recollection I should single out Judges Dean and Clarke as typical of the country bar and Sharswood and Tilghman as types of the city bred lawyer. It is, however, the proud heritage of the profession that as a court it has never been warped by sectional bias, and as conditions changed and new questions arose its members have been found fit to meet them; "the expansive property of the common law" and the administration of justice under the Pennsylvania system have tended to make no loyal lawyer of liberal culture in his profession ill at ease in any of its courts. Nothing could better illustrate the rapid obliteration of the old demarcations than the frequency with which lawyers of reputation from large cities and their contemporaries from interiors of the commonwealth are engaged in the same case—albeit it has been observed as to the judiciary that the Macedonian cry for help more frequently goes out *from* than *into* the sadly overworked and grievously underpaid judiciary of Philadelphia!

*Kaul v. Weed* [203 Pa., 586], was a case in which the leader of the Philadelphia bar—which, of course, means leadership of the American bar—met one whom if it were not invidious to praise the living, I should pronounce the typical country lawyer of his day. The case is interesting as determining the construction of what is covered by a

grant of "timber," when at the time of the contract there were no chemical or pulp factories in the country at which trees of a certain size and variety were marketable. The decision of the case loses nothing from the fact that the opinion of the court below, by a representative country judge, was affirmed in an opinion by a vigorous member of the appellate court whose splendid training for his present place was exclusively and peculiarly that of a "country lawyer."

The mind of man is broadened by the process of the suns. No Philadelphia lawyer any longer thinks the Schuylkill is the western boundary of the commonwealth; he knows it stretches far beyond Bryn Mawr—way out to Cambridge Springs. Nothing better illustrates this than the story that when the single objection made to the elevation of that brilliant jurist who was so soon translated from the bench of *your* city to *our* bench of the State, was that he lacked a knowledge of the law of the anthracite fields, he declared his willingness to spend his vacation in a coal mine if that experience could add anything to his equipment for the place to which he was so fitly called and which he so completely fills.

#### OPPORTUNITIES ARE EQUAL.

In the labors and emoluments of the profession "honors are easy" between town and country. Opportunity knocks at their gates alternately; there are everywhere comparatively few who are alert to its call; and the conditions of success are substantially the same. To the average man of ability, industry and integrity a measure of success is probably better assured in the smaller field; and yet the very highest distinction is not there so readily attained. The country lawyer is less apt to become a national figure as a lawyer, because as a rule his practice in the Federal Courts is quite limited. The personal equation enters far more largely into the experience of the rural practitioner. He shares his client's cause more intimately and there is, to many temperaments, real joy in the closer relation to client,

court and jury. Political ambition is more apt to be a fatal lure. The fact that harder work often brings less substantial reward is no cause of despair to the true professional spirit. I have known at least a half dozen men come to the bar to which my own practice has been mostly limited, from other bailiwicks, penniless and friendless, and within two decades they attained its leadership and amassed fortune enough to satisfy even avarice. I do not think any one of these—and among them were James Buchanan and Thaddeus Stevens—was ever admitted to and none of them ever practiced in the Supreme Court of the United States.

There has just been published this week, for the first time, I think, a letter written in June, 1861, by a country lawyer and judge, who had gathered at forty the very highest honors of the bench and bar, and upon his retirement from office he admitted a debt of \$2000 to his patron and friend, and solicited an additional loan of \$1500. He subsequently settled in a country town, and, during the next twenty years, made a million dollars in fees and never even had an office except "in his hat."

The labor saving—and perhaps the labor making—devices of the modern law office have, of course, reached far into the back country; but the day is not remotely past when the country lawyer had the benefit of that useful discipline which comes from the laborious drawing of legal instruments—an exercise, by the way, that is better for the unoccupied leisure of a tyro at the bar than baseball, bridge whist or pink teas.

To one stately figure who in past years towered, Saul-like, in the company of country lawyers, the profession owes the introduction of what are known as printed paper books—to the absence of them in the Supreme Court Chief Justice Mitchell rather inquiringly refers in the address from which I have before quoted. I have learned that the late Joshua W. Comly, a big lawyer in the little county of Montour, first used them. When he was admitted to the bar of the Supreme Court, in 1833, it was the practice for the counsel for the plaintiff in error to make out in writing one copy

of the record of the case as returned by the lower court, including, of course, the evidence and everything else which the latter court made part of the record, for each of the judges of the Supreme Court, and one copy for the counsel for the defendant in error (making in his time *six* copies altogether), with a copy of the assignment of errors attached to each. These were delivered when the case was called for argument, and the counsel for the plaintiff in error used the copy of the record returned by the lower court as his or their paper book. The making out of the six copies, especially when much evidence was made part of the record, required a deal of labor and time to make and was very inadequately paid for, and as Comly could not afford to keep a clerk it was to him, as he himself says, "a personal bore of great magnitude." Some time about 1841 he took the stand that he would make out one copy for the printer and that all his paper books should thereafter be printed. All the paper books he made out for the July Term, 1842, including the case of *Ash v. Ashton* [3 W. & S., 510], and *Moorehead v. The West Branch Bank* [Idem, 550], and such unreported cases as he argued for the plaintiff in error at the 1842 term, were printed, and were the first ever submitted—certainly in the then Northern District. The printed copies pleased the judges of the Supreme Court, and the next year many other lawyers had their paper books printed.

As this all too discursive and protracted paper must end suddenly somewhere, may I not close with the brief tribute of one great representative of our class to another, gone before. In a letter written by Simon P. Wolverton, in answer to an inquiry for something more about Comly, he says: "When I came to the bar, in 1862, Mr. Comly was employed in every case of any importance in this region, on either one side or the other. He was a thorough lawyer, and one of the ablest I ever knew, and did as much to make a lawyer of me as any other one at the bar, because when he was on the other side I had no peace of mind until the case was over. At that time it was not so easy to get to

the jury as now. He was an excellent pleader and would chase you around with demurrers until you became very tired. I have spent many a night in my office to get ready to meet him next morning, and was always anxious to be with him, which I was in many cases, to prepare the case, as he generally expected young counsel to do. He was the soul of honor, a man of the strictest integrity and who would not tolerate dishonesty even with his clients, and I have seen him abandon a case at bar when he found his client had deceived him. While he made no pretence to be a Christian, as generally understood, I believe he was as good as any of them, and a better Christian than many. He once said to me at the funeral of ————, that if he came to the parting of the roads and saw the names of deceased and a lot more like him that he knew, on the road where the finger boards pointed to Hell, and many others on the road where the finger boards pointed to Heaven, he would say that some scamp had been tampering with the finger boards. And this is what I think of him in a similar position. If his name was not on the board pointing to Heaven, I should say somebody had been tampering with the sign posts."

And of such is the great empire of the country bar!